No. 6587

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, Deputy Commissioner 13th Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and V. H. HAMMER,

Appellants,

vs.

PACIFIC STEAMSHIP COMPANY, a corporation; UNION INSURANCE SOCIETY OF CANTON LTD., a corporation,

Appellees.

No. 6587

Brief of Amici Curiae on Behalf of Seattle Waterfront Employers and Portland Waterfront Employers.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

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STATEMENT.

The above case is the fourth case of its kind decided in the lower courts of the Pacific Coast and the second case

to reach this court on appeal. These cases are as follows:

Mahoney v. Marshall, 46 Fed. (2d) 359 (Winkler case, Washington). (Already before this court.)

Luckenbach v. Marshall, 48 Fed. (2d) 625 (Bromberg case, Oregon). (On its way to this court.)

Nelson v. Pillsbury, 48 Fed. (2d) 883 (3 Awards, California). (On its way to this court.)

Pacific Steamship Company v. Pillsbury (Hammer case, California) 1931 A. M. C. 1243.

The undersigned counsel have participated in all but the *Nelson* case. Each case involves the same fundamental question of law, based, however, upon somewhat varied facts. Examinations of the decisions of the lower courts reveals the following principal facts found by the courts below.

WINKLER CASE.

Winkler worked 182 days or parts of days:

Admitted earnings previous year	$1,266.20
Average admitted earnings per week	$ 24.34
Compensation paid and upheld by court, per week	$ 16.23
Deputy Commissioner's award based on earnings of M. Diegnan. (Worked 284 days or parts of days)	$2,314.45
Deputy Commissioner gave Winkler theoretical annual earning capacity, ($\frac{\$2,314.45}{284}$ multiplied by 300)	$2,445.00
Compensation awarded by Deputy Commissioner, per week	$ 25.00

BROMBERG CASE

Bromberg worked 153 days or parts of days:

Admitted earnings previous year	$1,121.38
Average admitted earnings per week ($\frac{\$1121.38}{49 \text{ weeks actually worked}}$)	$ 22.88
Compensation paid and upheld by court, per week	$ 15.26
Deputy Commissioner's award based on actual earnings Hermson (worked 271 days or parts of days)	$2,276.69
Deputy Commissioner's award based on theoretical earning capacity $\frac{\$2,276.69}{271}$ multiplied by 300	$2,520.00
Compensation awarded by Deputy Commissioner, per week	$ 25.00

NELSON CASE.

Lawlor actual earnings estimated, per month $100.00

Lost 3 months account illness, worked less than 5 days a week remaining 9 months, not member of regular gang, "free lance". Compensation based by Deputy Commissioner upon actual earnings of W. Davidson working 297 days and receiving in actual wages previous year $2,138.95. Deputy awarded $25.00 per week compensation.

Peterson actual earnings previous year $1,600.00

working about 250 days and voluntarily laying off about 3 weeks. Again W. Davidson's earnings were used as the basis for compensation and $25.00 per week awarded.

Kugland worked about 260 days with no record of lay-off, illness or injury. Actual record showed earnings $870.37. Testified to doing outside work. W. Davidson's record was again used and the maximum $25.00 per week awarded.

The court divided the men into earnings groups as shown by the testimony and held that none of the three above mentioned were anything like the earnings class of Davidson. In other words, the court held to arrive at the ultimate result sought, the "earning capacity" of the individual and those of his *same earnings class* must be examined. The court held it was error to merely take the earnings of some individual high earner and use that indiscriminately as the basis for awarding the maximum in each case.

HAMMER CASE.

Hammer employed on cargo list, lowest grade of water-front employment, actual earnings previous 4½ months $355.38; actual average weekly earnings 19 weeks, $18.68. Deputy Commissioner's award based on earnings of Trimball who averaged for 14 months before accident $223.79 per month, or over $50.00 a week. Trimble was employed on regular gang or preferred list, the highest grade of water-front work and "Trimble worked harder and longer hours than any other man on the water-front".

ARGUMENT.

Compensation under the Longshoremen's Act in common with all but two of the compensation acts of the United

States is based upon a percentage of "wages" or "earnings". In Bulletin 496 of the United States Bureau of Labor Statistics published by the United States Government Printing Office in November, 1929, we find on page 16 the following:

> "In all but two States (Washington and Wyoming) the amount of compensation is based upon wages."

On the same page it refers to the percentages allowed by the compensation acts of the various states, starting at 50% in 15 states to 66-2/3% in 16 states and under the United States Employees Compensation Act and the Longshoremen's and Harbor Workers' Act. On the same page we find the following:

> "It is obvious that the reduction of a workkman's income by one-half or even by one-third, the most liberal percentage provision, leaves a large proportion of his loss uncompensated."

On page 18 of the same publication we again find the following:

> "Another leveling feature of most laws is the establishment of a weekly maximum and minimum. The former may prevent the higher paid employee from securing the full proportion of his earnings that the percentage provision would indicate, while the minimum named is often affected by the qualification that if the wages received are less than such minimum the amount of the actual wages shall be paid as a benefit."

These quotations and the wording of the Act itself and the fundamental theory of all compensation acts clearly demonstrate that any construction of the Act which utterly disregards earnings of the injured individual in every case

is absolutely unsound and unthinkable. Such a construction giving the maximum award to every longshoreman regardless of the facts of his case completely overlooks the safeguards to employer and employee of the maximum and minimum limits fixed by the Act.

In Section 8 of the Longshoremen's Act, 33 U. S. C. A. 908, we find the various percentages allowed for disability, the basic theory being that "66 2/3 per centum of the average weekly wages shall be paid to the injured employee during the continuance of"

1. Permanent total
2. Temporary total

or

3. Permanent partial disability.

In Section 9 of the Act, 33 U. S. C. A. 909, percentage of "average" wages allowed to widows and surviving children are enumerated, always with the proviso "that the aggregate shall in no case exceed 66 2/3 per centum of such wages."

As a further limitation upon the maximum to be received in case of injury, we find these two provisions:

In Section 6 of the Act, 33 U. S. C. A. 906,

> "Compensation for disability shall not exceed $25.00 per week, nor be less than $8.00 per week, providing, however, that if the employee's wages at the time of injury are less than $8.00 per week, he shall receive his full weekly wage."

We find the same limitation in the case of death benefits. It will be noticed that the Federal Act used the term "wages" and speaks of a percentage of "average

wages''. The term ''wages'' is a misnomer. Under the British Acts, the word used is ''earnings'', which is correct. *''Wages'' technically means the rate of the remuneration for services performed. ''Earnings'' on the other hand represents the rate of remuneration multiplied by the time worked, or the result of wage rate and time worked.* Under the Act, however, ''wages'' means the same as ''earnings''. Wages are usually *fixed,* earnings are *''average'',* depending on the variable element of time worked.

In *Sloat v. Rochester Taxicab Company,* 163 N. Y. S. 904, a taxicab driver's wages were $12.00 per week and his tips average $5.10 per week. The Commissioner added the two in computing his average annual earnings. An attempt was made to distinguish between ''earnings'' under the British statute and ''wages'' under the New York Act. The employer attempted in this case to hold the compensation down to ''wages'' and not to ''earnings''. The court said:

> ''We must give further attention to Section 14. In three of its five subdivisions it speaks of the 'average annual earnings' of the employee, indicating the legislature saw no broad distinction between the word 'earnings' and the word 'wages', and under the facts of this case no distinction between them is apparent.''

This case was affirmed by the highest court of New York, 221 N. Y. 481, 116 N. E. 1076.

We now have the fundamental principle of this Compensation Act; namely, that an employee during compensation will receive 66 2/3 per centum of his ''wages'' or

"earnings". Then we come to Section 10 of the Act, 33 U. S. C. A. 910, which provides the mechanics for carrying out the principle of the Act. It provides in substance three methods of arriving at the "average weekly wages" of the employee. "Wages" means "earnings" and the three methods prescribed by the statutes are the mechanics for arriving at the "*average* weekly earnings" of an injured man. Under (a) if the injured man has worked substantially the entire year preceding his injury, his average annual earnings are 300 times his average daily wage, or his daily earnings. Under (b) if an injured man has not worked substantially the whole of the preceding year, his average annual earnings consist of 300 times the average daily earnings of an employee "of the same class" who worked substantially the entire preceding year in the same locality and the same work.

Knowing that any purely mechanical method of computing "average annual earnings" will not fit all cases, Section (c) provides that if the two preceding methods cannot "reasonably or fairly" be applied that the "average annual earnings" of the injured man shall be such sum as having regard to the previous earnings of the injured man and those of someone working in the same class "shall reasonably represent the annual earning capacity" of the injured employee in his employment at the time of the injury. Of course, the "average annual earnings" divided by 52 gives the "average weekly earnings" to which the percentages are applied.

The ultimate problem is, what is the "earning capacity" of the injured employee? (a) and (b) give a mechanical

"convenience" device. If it leads to an unfair or unreasonable result then (c) will be applied.

In *Gunther v. U. S.*, 41 Fed. (2d) 151, this court so held, saying:

> "* * * his ability to earn should be the primal basis of determining compensation.
>
> "* * * the conclusion to be arrived at is a sum 'which shall reasonably represent the earning capacity' ".

There the court held (b) could "fairly and reasonably" be applied to the facts of the case before it. In all the cases referred to above, the Commissioner made no express finding on this fundamental question which had been definitely put in issue, but the lower court has held that the application of (b) to the individual case leads to an unfair and unreasonable result and, therefore, (c) must be applied. We ask affirmance.

FINDINGS OF COMMISSIONER.

In the four cases decided to date by the lower courts, great stress has been laid by the claimant and the government upon the findings of the Commissioner, upon the well-known doctrine laid down by this and other courts that his findings are conclusive if supported by any testimony. Taking it all in all, the employers have not found fault with the findings of *fact* of the Commissioner; it is only with the *conclusions* drawn by the Commissioner that they have taken issue. It is obvious from reading the decisions of the four lower courts that the Commissioners

have made no attempt to find what we believe to be the fundamental finding which they have to make; namely, what is the *average annual earning capacity* of the injured employee. The findings of the Commissioner in all the cases have merely held that the claimant was injured under circumstances entitling him to compensation under the Longshoremen's and Harbor Workers' Act. Thereupon, some longshoreman in the port of an extraordinarily high earning ability is selected. His wages are divided by the number of days he worked, then multiplied by 300 and the result is arbitrarily stated to be the *average annual earning capacity* of the injured man, when in fact the result is higher than the earnings of the high earner. In the Washington case and the Oregon case the Commissioner made a specific finding that they were of the same class, basing this obviously upon the proposition that the two men were both longshoremen. Of course, we disagree with this *conclusion,* not *finding.* In the California case now before the court and apparently in *Nelson v. Pillsbury* (above), there was not even a finding by the Deputy Commissioner that the injured man and the man by whose earning record his compensation was computed were "of the same class". We may, therefore, dismiss the argument about the sacred character of the Commissioner's findings. His findings as far as they affect these cases are merely arbitrary conclusions upon which the court must exercise its judgment. *The question involved is not a question of fact; it is solely a question of law.*

INJURED MAN'S ACTUAL EARNINGS.

If, from the facts, the Deputy Commissioner finds that the application of (a) and (b) would lead, in a particular case, to an "unfair or unreasonable" result, then we must proceed as follows:

If the injured man's actual earnings for some time prior to the time of his accident reasonably represent his annual earning capacity in the longshoring industry, we believe that they must be used to compute his compensation. Where actual earnings are unknown, or where for some reason such as lost time, etc., an employee's actual earnings do not fairly represent his earning capacity in the industry, then so-called "class" earnings must be considered. This is very clearly illustrated in the case of *Orlando v. Snyder,* 246 N. Y. S. 224, where the court said:

> "If his past earnings for the time concerning which the proof was given appear to be indicative of what he normally earned, there would be no reason to consider the earnings of other employees, but if for any reason the proof indicates that his actual earnings for that period were not fairly representative, consideration may be given other earnings of others 'who worked in the same or a neighboring locality' ".

Consideration of class earnings eliminates another objection which has been made to actual earnings. It has been said that if a new man starts to work, his actual earnings for the past year might not reasonably represent his earning capacity during the period of his injury. If, however, class earnings are used and men of his class have increased their earning capacity, this element must be

considered by the Commissioner in determining what fairly represents an injured employee's earning capacity during the period of his disability; *in other words, actual earnings are only controlling where they reasonably represent the earning capacity of an injured man during the period of his disability. If they do not fairly represent his earning capacity, then outside class earnings and other elements must be considered by the Deputy Commissioner in determining the ultimate result.*

NEW YORK ACT.

The Longshoremen's and Harbor Workers' Act was borrowed from the New York Act. Although under extraordinary circumstances jurisdictions borrowing laws in this fashion do not follow the construction placed on such laws in the earlier jurisdiction, still, we have been referred to no reason whatsoever in this case why the Federal courts should not follow the construction placed on a compensation act by the courts of New York before that act was bodily borrowed by the Congress of the United States. The courts of New York had very definitely laid down these principles of law as applicable to their Act.

Section (c) (3 under the New York Act) is applicable to piece work. *Shaw v. American Body Company,* 178 N. Y. S. 369.

Section (c) is applicable to seasonal industries. *Blatchley v. Dairymen's League,* 232 N. Y. S. 437, and cases cited.

Section (c) may be applied to other than season industries when (a) and (b) cannot "reasonably and fairly" be applied.

Prentice v. N. Y. State Railways, 168 N. Y. S. 55, where a man worked 7 days a week; here the court said:

> "The number 300, used in those subdivisions, is not an arbitrary selection, but was evidently selected because it bears an approximately close relation to the number of working days in a year, Sundays and holidays excluded. Manifestly, where an employee works seven days a week for substantially an entire year, the method of determining his average annual earnings, indicated in either subdivision 1 or 2, would be an injustice to him, just as much as *it would be an injustice to the employer to apply those subdivisions to a case where the injured employee has worked less than six days a week for a substantial period of time.* The claim here falls more appropriately within subdivision 3 of the section, which provides for a case where 'either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied.' The commission properly determined that this claim falls within subdivision 3."

Reno v. Shenandoah Cotton Co., 179 N. Y. S. 46, where a man worked 5 nights a week.

Rooney v. Great Lakes, 180 N. Y. S. 653, where a man worked as fireman and coal passer. Here the court said:

> "The true test is the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness."

Roskie v. Amsterdam Yarn Mills, 181 N. Y. S. 891, where a man worked 5½ days a week.

The policy of the New York Act is to give compensation not to exceed 2/3 of earnings.

Friedenberg v. Empire, 154 N. Y. S. 351 (a very early case under the New York Act).

In *Roskie v. Amsterdam,* the court said:

> "The award should not exceed 2/3 of the earning capacity."

In *Littler v. Fuller,* 233 N. Y. 369, 119 N. E. 554, the court again said:

> "The award should not exceed 2/3 of the earning capacity."

GUNTHER DECISION.

In the Winkler case on pp. 33-38 of appellee's brief now before this court, the relation of the Gunther case to the situation involved in the cases referred to above is discussed at length.

The fundamental distinction is that in the Gunther case this court found the application of (b) was fair and reasonable.

In the Winkler and other cases referred to above, the Deputy Commissioner made no finding on this point, but the *court did.* The court's findings we submit are amply supported by testimony.

If there is any question in the court's mind, and if it feels that it should have the finding of the Deputy Commissioner on this point, we suggest the cases be referred

back for a finding under proper instructions. We believe this unnecessary, as the testimony is substantially undisputed and the conclusion is really one of law for the court.

CONCLUSION.

The facts shown by the Winkler case (Washington), the Bromberg case (Oregon), the Nelson case (California) and the present case (Hammer) all show that as far as the facts of those cases are concerned the application of (a) and (b) would lead to an unfair and unreasonable result. This result in the Winkler case would lead to giving a man more when he is laid up on account of injury than he actually earned per week in the industry during the three years immediately preceding his accident under normal conditions. In the Bromberg case, likewise from the decision of the lower court, it appears that his total annual earnings were $1,121.38 or an average weekly earning capacity of $22.88. By the Deputy Commissioner's award he was allowed $25.00 per week compensation. The same result follows in this case.

It has been urged that the employers are asking the court for some unusual construction. We respectfully submit that the reverse is the case. The construction now sought by the employers was uniformly placed on the Act until the decision of this court in the Gunther case. In each case, the Deputy Commissioner, after deciding (a) and (b) led to an unreasonable result, determined what reasonably represented the injured man's "annual earning capacity" and then applied the percentages of the Act.

From the foregoing, we respectfully submit the following:

1. That the fundamental principle underlying the Longshoremen's and Harbor Workers' Act is to give to an injured employee 2/3 of his earnings when laid up; thus imposing upon the employer 2/3 of the economic loss sustained by the injury and upon the employee 1/3. This 1/3 acting as an incentive for the injured man to return to work.

2. Section 10 of the Longshoremen's and Harbor Workers' Act provides a mechanical formula for determining the "average annual earnings" of employees. This mechanical formula was obviously designed to eliminate the necessity in individual cases of exhaustive examinations of earnings figures.

3. Knowing that any rigid mechanical device would lead to results which would violate the fundamental principles of the Act, the framers put in a third section which stated in effect that if the rigid mechanical methods led to an unfair or unreasonable result, that the third method should be adopted.

4. The New York cases and cases from other jurisdictions illustrate the application of Section (c). There have been few American cases on the longshoring industry as such, as the Act is new. The British decisions, cited by appellees in the Winkler case, however, on longshoremen are enlightening and vigorously uphold the position for which the employers are now contending.

5. It is a proposition of law for which no authority need be cited, that a court will so construe an Act that it will carry out the intention of the legislature and that the result attained will be fair and reasonable, particularly where the Act itself so provides.

We respectfully submit that the judgment of the District Court should be affirmed on the facts presented, from strict legal construction, economic expediency, and upon sound compensation principles as illustrated by the decisions of the great state from which the Act was bodily borrowed.

Respectfully submitted,

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